

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 21, 2013

v

DARNELL NELOMS,

No. 307698
Saginaw Circuit Court
LC No. 10-034743-FH

Defendant-Appellant

Before: K. F. KELLY, P.J., and MARKEY and FORT HOOD, JJ.

PER CURIAM.

A jury convicted defendant of third-degree criminal sexual conduct, MCL 750.520d, and the trial court sentenced him to 18 months' to 15 years' imprisonment. Defendant appeals by right. We affirm.

Defendant argues that prosecutorial misconduct and ineffective assistance of counsel require reversal. The prosecutor stated the following in his closing argument:

Well, the People would contend she [the victim] never wavered, never wavered in her version of what happened that night, both outside and inside the defendant's car that was parked there on Sandra Court. Her version of what happened has stayed consistent for over a year. From when she first told the defendant's half sister and the defendant's mother what had happened to her, to when she gave her statement at the Saginaw Police Department, to when she testified at that earlier hearing, the preliminary examination, to when she testified yesterday on the witness stand in this trial. The People would contend to you that consistency is an indication of reliability.

Defense counsel did not object to this argument or request a curative instruction. Nevertheless, the jury instructions included the following caution:

The lawyers [sic] statements and arguments are not evidence. They are only meant to help you understand the evidence and each sides [sic] legal theories. You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge.

Defendant contends that the victim's prior statements were not in evidence and that the prosecutor improperly bolstered her credibility in his closing remarks by implying that these statements were consistent with her trial testimony. Because defendant's claim of prosecutorial misconduct was not preserved through an objection at trial, our review is for plain error that affected defendant's substantial rights. *People v Schumacher*, 276 Mich App 165, 177; 740 NW2d 534 (2007). Defendant argues that the prosecutor's statements constitute plain error, or that defense counsel was ineffective for failure to object and request a curative instruction.

We conclude that the prosecutor's statements were not improper, and, even if they were, any error was cured by the trial court's instructions to the jury.

First, the prosecutor's statements did not constitute improper bolstering. A prosecutor's remarks must be evaluated in the context of the evidence and arguments trial. *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). It is improper for a prosecutor to make a statement of fact to the jury that is unsupported by the evidence. *Schumacher*, 276 Mich App at 178. And, a prosecutor may not "vouch for the credibility of a witness to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). But prosecutors are accorded great latitude to argue the evidence and all reasonable inferences that may be drawn from the evidence relating to their theory of the case. *Id.* at 282.

Our review of the record reveals that the prosecutor's closing remarks were proper because they were based on facts in evidence. The victim testified about the specifics of her preliminary examination testimony and her statement to the Saginaw police. The victim further testified that while she was still visibly shaken and crying and her hair was a mess, she went to defendant's half sister and mother and told them "what happened." She also testified that defendant's mother immediately tried to contact defendant. Thus, the prosecutor's statements were based on admitted evidence and the reasonable inferences to be drawn from it, not special knowledge that the jury did not have. The prosecutor merely argued that based on the evidence presented, the jury could conclude that the victim's version of events had been consistent throughout the proceedings. This argument was well within the prosecutor's role as an advocate. *Bahoda*, 448 Mich at 282. Defendant has not shown plain error affecting his substantial rights.

Moreover, the jury was instructed that the statements and arguments of the attorneys are not evidence and should be accepted only if supported by the evidence. Any possible prejudice resulting from improper bolstering was cured by this instruction. *Id.* at 281; see also *People v McGhee*, 268 Mich App 600, 633-634; 709 NW2d 595 (2005).

Defendant's claim of ineffective assistance of counsel is without merit. Claims of ineffective assistance of counsel are mixed questions of law and fact. The trial court's findings of fact are reviewed for clear error. Whether those facts constitute ineffective assistance of counsel is a question of law, which is reviewed de novo. *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). Ineffective assistance of counsel requires a showing that counsel's performance fell below an objective standard of reasonableness and that but for this deficiency, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309, 338; 521 NW2d 797 (1994).

In this case, defendant cannot show any deficiency in the performance of defense counsel. The prosecutor's remarks were not improper. But even if they were, the trial court's instructions to the jury cured any possible prejudicial effect, *Bahoda*, 448 Mich at 281. Consequently, defendant cannot show a reasonable probability that but for the purported deficiency the outcome of the trial would have been different. *Strickland*, 466 US at 694.

We affirm.

/s/ Kirsten Frank Kelly

/s/ Jane E. Markey

/s/ Karen M. Fort Hood